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Nos. 88-1426, 88-1592 and 88-1636

In the Supreme Court of the United States

OCTOBER TERM, 1988

OMAHA INDIAN TRIBE, ET AL., PETITIONERS

v.

HAROLD JACKSON ET AL.

JOHN R. WILSON, ET AL., CROSS-PETITIONERS

v.

OMAHA INDIAN TRIBE, ET AL.

STATE OF IOWA, ET AL., CROSS-PETITIONERS

v.

UNITED STATES, ET AL.

ON PETITION AND CROSS-PETITIONS FOR WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether two named counsel for the United States engaged in "forced, fraudulent representation" of the Tribe's interests in this litigation.

2. Whether the instant litigation should have adjudicated those parts of the Tribe's claims that have been severed for future consideration.

3. Whether the district court violated Fed. R. Civ. P. 52(a) when it concluded that it was unnecessary, on the third remand of this complex litigation, to reiterate the factual findings set forth in earlier opinions.

4. Whether the burden-of-proof provisions of 25 U.S.C. 194 were correctly applied to the facts of this case.

5. Whether the escrowed net profits from the farming operations on the lands at issue were available to defray the payments to the defendants for the improvements they had made to those lands, as to which title has been quieted in the United States for the beneficial interest of the Tribe.

6. Whether the burden-of-proof provisions of 25 U.S.C. 194 subject the petitioners in No. 88-1592 to invidious racial discrimination in violation of the Due Process Clause of the Fifth Amendment of the Constitution.

7. Whether a decision to apply 25 U.S.C. 194 to the claims of the State of Iowa would deprive that State of its constitutional rights.

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OPINIONS BELOW

The latest opinion of the court of appeals (Pet. App. 37a-48a)[1] is reported at 854 F.2d 1089. The latest opinion of the district court (Pet. App. 5a-15a) is reported at 578

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[1] "Pet. App." refers to the Appendix to the petition in No. 88-1426.

F. Supp. 1191. The final judgment of the district court (Pet. App. 16a-30a) is unreported; the modification thereof (Pet. App. 31a-36a) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on August 12, 1988, and a petition for rehearing was denied on November 10, 1988 (Pet. App. 49a). Justice Blackmun extended the time for filing a petition for a writ of certiorari to and including February 28, 1989. The petition, No. 88-1426, was filed on that date and received by both cross-petitioners on March 3, 1989 (88-1592 Pet. 2; 88-1636 Pet. 3). Pursuant to Sup. Ct. R. 19.5, the cross-petition in No. 88-1592 was filed on March 30, 1989, and the cross-petition in No. 88-1636 was filed on Monday, April 3, 1989. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

This litigation is a dispute over title to land within the original boundaries of the Omaha Indian Reservation created by treaty in 1854 along the west bank of the Missouri River in what was then Nebraska Territory. The River has changed course numerous times since 1854. In 1867, when the portion of the Reservation boundary at issue was surveyed by T. H. Barrett (the Barrett Survey), the River made a sharp oxbow curve creating a peninsula attached to the west or Nebraska side of the River.[2] The approximately 2,900-acre peninsula, which has since been cut off from the Nebraska side by the River and now lies

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[2] The district court described the oxbow early in this litigation as "a meander lobe or peninsula sticking out like a thumb pointing east from Nebraska into Iowa" (Pet. App. 207a). Maps of the area at various times appear at Pet. App. 58a-65a.

on the eastern or Iowa side, is referred to in this litigation as the Barrett Survey Area.

In 1975, the United States brought suit as trustee for the Omaha Tribe to quiet the government's title to the lands within the Barrett Survey Area, with the exception of about 400 acres that had been allotted to individual Indians and subsequently sold to non-Indians (the fee-patented lands). Pet. App. 95a, 100a, 263a.[3] The Tribe subsequently filed two suits in its own right, claiming title not only to the fee-patented lands, but also to a larger 6,390-acre area known as Blackbird Bend, which encompasses the Barrett Survey Area, and to about 5,000 acres within two additional bends upstream (Pet. App. 253a, 269a). The three suits were consolidated and the Tribe's claims to lands outside the Barrett Survey Area and for damages were severed. The district court entered judgment against the Tribe and the United States in 1977 with respect to the common claims for the Barrett Survey Area (Pet. App. 252a). The court of appeals reversed (Pet. App. 135a), and this litigation came before this Court for the first time in *Wilson* v. *Omaha Indian Tribe*, 442 U.S. 653 (1979); the Court there vacated the court of appeals' judgment and remanded the case for further proceedings. Over the last decade, the subsequent proceedings in both courts below have again culminated in a final judgment, which the Tribe[4] now asks this Court to review.

The fundamental factual issue in this litigation is whether the Missouri River moved by avulsion or by ero-

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[3] In preparing answers to interrogatories, the United States discovered an additional 300 acres that had been allotted and sold.

[4] For the sake of simplicity, petitioners in No. 88-1426 will be referred to as the Tribe, conditional cross-petitioners in No. 88-1592 will be referred to as individual defendants, and conditional cross-petitioners in No. 88-1636 will be referred to as the State.

sion and accretion subsequent to the Barrett Survey.[5] The Tribe's claims of title rest on the contention that the River moved by avulsion prior to 1923, and thereafter by erosion and accretion along the western edge of the survey area. The fundamental legal issue involves the interpretation and the scope of 25 U.S.C. 194.[6] This Court in *Wilson* concluded that Section 194 applies to disputes with Indian tribes, and that it shifts the burden of persuasion, as well as the burden of coming forward with evidence, to the non-Indian party once the Indian party establishes a prima facie case, but that Section 194 does not apply to a State. 442 U.S. at 664-669.[7]

Applying the interpretation of Section 194 adopted by this Court in *Wilson*, the court of appeals on remand ordered title to approximately 1,900 of the 2,900 acres in the Barrett Survey Area quieted in the United States on

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[5] As the Court explained in *Wilson* v. *Omaha Indian Tribe*, 442 U.S. at 660 n.7 (citations omitted):

> Simply stated, when a river which forms a boundary between two parcels of land moves by processes of erosion and accretion, the boundary follows the movements of the river. On the other hand, when a river which forms a boundary between two parcels of land abruptly moves from its old channel to a new channel through an event known as avulsion, the boundary remains defined by the old river channel.

[6] That Section provides that:

> In all trials about the right of property in which an Indian may be a party on one side, and a white person on the other, the burden of proof shall rest upon the white person, whenever the Indian shall make out a presumption of title in himself from the fact of previous possession or ownership.

[7] The Court also concluded that, although federal law governs the definition of what types of river movement constitute avulsion rather than erosion, state law should be adopted as the federal rule of decision. 442 U.S. at 671-676.

behalf of the Tribe; it remanded to the district court for further proceedings with respect to the fee-patented lands and certain lands in the western part of the Barrett Survey Area claimed by the State of Iowa. *Omaha Indian Tribe* v. *Wilson*, 614 F.2d 1153 (8th Cir.), cert. denied, 449 U.S. 825 (1980). On remand, the district court found that the Tribe had proved by a clear preponderance of the evidence that neither the State nor the individual defendants had a valid claim to the disputed land, and quieted the title to the entire Barrett Survey Area in the United States as trustee for the Tribe. *United States* v. *Wilson*, 523 F. Supp. 874 (N.D. Iowa 1981) (Pet. App. 76a-84a).[8] The district court also denied the individual defendants' counterclaim for the value of their improvements to the lands, holding that the sovereign immunity of the United States barred the counterclaim (Pet. App. 84a-89a).

On appeal, the court of appeals reversed, holding that the district court had improperly given the Tribe the benefit of 25 U.S.C. 194 in adjudicating the claims to the lands held by the State and to the fee-patented lands. *United States* v. *Wilson*, 707 F.2d 304 (8th Cir. 1982), certs. denied, 465 U.S. 1025 and 1101 (1984) (Pet. App. 94a-103a). The court of appeals also ruled that the United States could be held liable for the value of improvements, holding that the equitable duty to pay for the improvements "is an element of the government's own claim, a condition precedent to the right of the United States to recover" and that the doctrine of sovereign immunity was therefore "inapplicable" (Pet. App. 106a). This Court

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[8] The district court concluded that the court of appeals' opinion established the Tribe's ownership of all the Barrett Survey Area land (including the fee-patented lands) except that claimed by the State along the western edge of the area, and since the river had moved by accretion, not avulsion, the Tribe owned that land as well. Pet. App. 74a-77a & n.15.

denied the United States' petition for certiorari on that issue, 465 U.S. 1025 (1984).

Once again on remand, the district court issued its most recent opinion, holding that, without benefit of the Section 194 presumption, the Tribe had failed to prove that the river movements between 1879 and 1923 were avulsive and thus had failed to prove its claims to either the fee-patented lands or to the land held by the State, and that the individual and state defendants had met their burden of proving that title to these lands should be quieted in them. *United States* v. *Wilson*, 578 F. Supp. 1191 (N.D. Iowa 1984) (Pet. App. 8a-15a). The final judgment, dated May 29, 1987 (Pet. App. 16a-30a), quieted title to the 1,900 acres of the eastern Barrett Survey Area in the United States in trust for the Tribe and quieted title in the remaining 1,000 acres of fee-patented land and land held by Iowa in the individual defendants and the State, respectively. The judgment also obligated the United States to pay the individual defendants for the stipulated value of the improvements, totalling more than $1.9 million plus prejudgment interest (Pet. App 22a), and permitted the United States to use the escrow fund held in the registry of the district court "to partially satisfy its obligation to pay for improvements" (Pet. App. 30a).[9] On the Tribe's motion, the district court subsequently amended its order and denied the United States the right of reimbursement from the escrow fund (Pet. App. 33a-36a).

[9] The escrow fund had been created pursuant to the district court's order of June 5, 1975, the preliminary injunction which put the Tribe in possession of the lands. In order to reduce the "probability of financial injury to the defendants," the court required the Tribe to deposit the net profits from the 1975 farming operations on these lands with the clerk of court pending final disposition of this quiet title action (Pet. App. 259a, 262a). The profits from subsequent years were also deposited (Pet. App. 34a-35a).

In the latest round of appeals, the Eighth Circuit affirmed the judgment quieting title to the remaining 1,000 acres in the Barrett Survey Area in Iowa and the individual defendants, rejecting the Tribe's claims that the district court erred first, in finding that the Tribe had not met its burden of proof and second, in failing to set forth its factual findings in sufficient detail (Pet. App. 40a-44a). The court of appeals upheld the government's claim on its appeal that the district court should have allowed the profits from the escrow fund to be used to pay for the improvements (Pet. App. 44a-45a), but it rejected the government's challenge to the award of prejudgment interest on the value of the improvements, holding that the award of interest was no more a breach of the government's sovereign immunity than the equitable requirement that the United States pay for the improvements (Pet. App. 45a-47a). Finally, the court of appeals rejected the argument of the individual defendants that, because 25 U.S.C. 194 placed the burden of proof upon them as white citizens, it amounted to invidious racial discrimination and violated Fifth Amendment due process (Pet. App. 47a).

ARGUMENT

1. None of the questions presented in the petition for certiorari in No. 88-1426 merits review by this Court. On these questions, the decision of the court of appeals is correct and does not conflict with any decision of this Court (including the earlier decision in *Wilson* v. *Omaha Indian Tribe, supra*), or of any other court of appeals.

a. Petitioner Tribe alleges that two named counsel for the United States engaged in "forced, fraudulent representation" of the Tribe's real interests in this litigation, and, as a result, the government's claims on behalf of the Tribe

were "intentionally constricted" (88-1426 Pet. 4-5, 18-22). The United States has responded to these charges in both the district court and the court of appeals, demonstrating that the government's filing of the complaint that initated this action was properly authorized in accordance with established procedures. See, *e.g.*, Pet. App. 329a-336a, 450a-460a. The district court found that the Tribe's contentions of impropriety were entirely without factual or legal basis. Indeed, after concluding that the Tribe's motion for summary judgment based on those contentions was "so flawed that no reasonable person could maintain that it is either factually well grounded or legally warranted", the court awarded sanctions against petitioner Tribe's counsel under Fed. R. Civ. P. 11 for frivolous pleadings (Pet. App. 365a-366a).[10] The court of appeals subsequently denied the Tribe's petition for relief based on these allegations as "frivolous and totally without merit"; that court also awarded sanctions against the Tribe's counsel for filing "a totally frivolous pleading" (*id.* at 461a). In the latest appeal, the Eighth Circuit refused to "entertain this meritless issue" again (*id.* at 40a n.4).

It is entirely clear that this issue does not warrant this Court's attention. The Tribe—represented by counsel of its choice—has participated fully in litigating title to the lands within the Barrett Survey Area, and nothing in the present judgment prevents the Tribe from pursuing its remaining claims to the larger area outside the Barrett survey.[11]

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[10] The same counsel continues to represent the Tribe in this Court.

[11] In the previously severed portion of the suit (see p. 3, *supra*), the district court found on March 24, 1989, that the Tribe and its counsel have not complied with several earlier orders in the instant portion of the suit—including orders requiring the payment to the individual defendants, the State, and the United States of specified costs as sanc-

b. Petitioner Tribe also appears to argue that the judgment below should have encompassed all the lands claimed by the Tribe, including those located outside the Barrett Survey Area (88-1426 Pet. 23-26). However, as the court of appeals correctly noted (Pet. App. 44a n.5), the scope of the present litigation was long ago limited to settling title to the lands within the Barrett Survey Area, leaving the Tribe's larger claims for later adjudication. See *Wilson* v. *Omaha Indian Tribe,* 442 U.S. at 660. The Tribe's remaining claims are yet to be litigated. The effect, if any, of the present judgment upon those claims remains for consideration in the context of that litigation (cf. Pet. App. 48a), and is accordingly not ripe for determination by this Court.

c. Petitioner Tribe also contends that the court of appeals failed to enforce the requirement of Fed. R. Civ. P. 52(a) that a district court must adequately set forth its findings (88-1426 Pet. 25-26). The district court's final opinion declared that "[n]othing is gained by recataloguing the evidence here" (Pet. App. 8a). The court of appeals stated that the adequacy of the findings "must be viewed against the extensive prior scrutiny of the evidence in this case not only by the district court on two occasions, but also by this court on three separate occasions and by the United States Supreme Court" (*id.* at 43a). The court of

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tions for frivolous filings, and orders imposing fines for contemptuous conduct. On the basis of these findings, the district court entered an order dismissing the Tribe's remaining claims with prejudice "unless the Tribe and Mr. Veeder fully comply with all orders as set forth herein, or show cause why they should not be required to do so by not later than April 10, 1989." Dist. Ct. Order 11. Petitioner Tribe's counsel submitted a check to the district court in payment of the amounts assessed, and asked the court to escrow the funds in its registry pending this Court's action on the instant petition for certiorari. On April 24, 1989, the district court denied the escrow request and directed the clerk to distribute the funds to the parties entitled to them under its previous orders.

appeals found (*id.* at 43a-44a) that the district court's reference to the prior decisions in this case "for a full statement of the extensive evidence" was sufficient to satisfy Rule 52(a). Nothing in this entirely routine conclusion warrants this Court's attention.

d. Petitioner Tribe challenges the application of 25 U.S.C. 194 to the factual context established in this litigation (88-1426 Pet. 25-26). The judgment below quiets the Tribe's beneficial title to all the trust lands which were in the possession of the individual, non-Indian defendants, while quieting title in those defendants only to those fee-patented lands to which the court found they held record title. The State, to which 25 U.S.C. 194 does not apply, prevailed in quieting its title to the lands for which the court found it held record title. See Pet. App. 12a-14a. There is no inconsistency on this record with this Court's decision in *Wilson* v. *Omaha Indian Tribe, supra.* In any event, this highly fact-specific claim does not warrant further review by this Court.

e. Finally, petitioner Tribe urges (88-1426 Pet. 26-28) that the court of appeals erred in permitting the funds escrowed in the district court registry to be used to defray part of the cost of improvements which the United States is obliged to pay under the judgment. The Tribe does not question that the individual defendants who occupied trust land are entitled to recover the value of the improvements from the United States. With that premise accepted,[12] the

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[12] Earlier in this litigation, the United States petitioned this Court for review of the court of appeals' holding (Pet. App. 106a) that the government could be held liable to pay for the value of the improvements, urging that sovereign immunity barred any such claim in a quiet title action in which the government sought only title, not damages or mesne profits. The petition was denied, 465 U.S. 1025 (1984). In the latest appeal, the Eighth Circuit used the same reasoning to hold the government liable to pay prejudgment interest on the value

holding of the court of appeals is clearly correct and consistent with the general trust law that a trustee is ordinarily entitled to reimbursement from the trust estate for expenses incurred for the benefit of the trust beneficiary (see Pet. App. 44a-45a). In this case, as the court of appeals found (*id.* at 45a), the Tribe "has obtained the substantial benefit of having the land within the Barrett Survey cleared, drained, and otherwise improved through the efforts of the non-Indian defendants." Title to the improved lands has been quieted to the Tribe's beneficial interest. Accordingly, the judgment properly allows the escrow fund to be used to reimburse the United States for its payment of the value of those improvements.[13]

2. Conditional cross-petitioners in No. 88-1592 and No. 88-1636 challenge the constitutionality of 25 U.S.C. 194. Because these petitions would be jurisdictionally out of time except for the provision of Rule 19.5 of the Rules of this Court, the issues presented therein are properly before this Court only if it grants the petition in No. 88-1426, on which they depend. See Sup. Ct. R. 20.5. The constitutional issues presented by cross-petitioners are, in any event, without merit.

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of the improvements, compounding its initial error in breaching the United States' sovereign immunity. See *Library of Congress* v. *Shaw*, 478 U.S. 310 (1986).

Since the Court has once denied review of the improvements issue in this case and the Tribe's petition does not question the individual defendants' right to be paid for their improvements, the government has concluded not to seek review of the improvements or prejudgment interest issues in this case—though these issues may well warrant this Court's attention if they should arise in another quiet title action by the United States.

[13] Indeed, the improvements made the land suitable for farming, and the escrow fund consists of the net proceeds from farming.

a. Conditional cross-petitioners in No. 88-1592, individual defendants who occupied Barrett Survey Area lands,[14] contend that 25 U.S.C. 194 unconstitutionally placed the burden in this litigation upon them as "white person[s]" to prove their title to the trust lands. They argue that this statute constitutes invidious racial discrimination favoring Indians and Indian tribes and deprives them of due process in violation of the Fifth Amendment. As cross-petitioners frankly acknowledge (88-1592 Pet. 4), this identical issue is one the Court declined to accept when it granted certiorari in *Wilson* v. *Omaha Indian Tribe, supra.* Instead, without finding it necessary to give separate consideration to that issue and without expressing any doubts as to Section 194's constitutionality, the Court held that it applies to these cross-petitioners (442 U.S. at 653). *Wilson* thus demonstrates that cross-petitioners' constitutional objections to Section 194 are insubstantial and do not warrant this Court's plenary consideration.

As the Court found in *Wilson*, Section 194 was enacted to address the serious problem of "recurring trespass upon and illegal occupancy of Indian territory," and "to protect the rights of Indians to their properties." 442 U.S. at 664. The Court's opinion leaves no room for doubt that "the purpose of th[is] provision—that of preventing and providing remedies against non-Indian squatters on Indian lands," *id.* at 667—is a legitimate end, or that Section 194 represents a rational and appropriate means of securing that end.[15] Indeed, the result in this case confirms that

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[14] The individual defendants occupied both Indian trust lands and fee-patented lands in the Barrett Survey Area.

[15] The State's argument notwithstanding (88-1636 Pet. 12-13), there is a plain and rational connection between the undisputed former status of this area as part of the Omaha Reservation and the statutory presumption that it remains so today. Section 194 "is triggered" only

Section 194 in fact serves to fulfill the federal government's special obligation to Indians and does not produce "invidious" consequences.

The individual cross-petitioners acknowledge (88-1426 Wilson et al. Br. in Opp. 4) that the Barrett Survey Area (within which the trust lands they claim are located) "was indisputably part of the Tribe's reservation in the 1860s." Their claim is that "the movements of the Missouri River * * * *destroyed the status of the land as reservation land*" (*ibid.* (emphasis added)). Cross-petitioners lost below simply because they could not prove by a preponderance of the evidence that this was so. Section 194 merely imposed upon them the burden to prove their contention that the reservation status of these lands had been "destroyed"—the same burden they would have had to shoulder if they had sued as plaintiffs for this land.[16] This

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after "the Tribe makes out a prima facie case of prior possession or title," *Wilson*, 442 U.S. at 668, and operates only to establish a rebuttable "presumption of [Indian] title," 25 U.S.C. 194. Thus, Indians remain as subject to "loss or gain from river movements as are other riparian owners" (88-1636 Pet. 13), even though Section 194 requires non-Indians who claim lands formerly in Indian ownership or possession to carry the burden of proof—and risk of non-persuasion—on the issue whether river movements have divested the Indians of ownership.

[16] Individual cross-petitioners assume that their status as defendants in this civil action entitles them as a matter of constitutional right to have the burden of proof placed upon the plaintiffs. It is highly doubtful that cross-petitioners have a constitutional right to any particular allocation of that burden. See *Lavine* v. *Milne*, 424 U.S. 577, 585 (1976) ("Outside the criminal law area, where special concerns attend, the locus of the burden of persuasion is normally not an issue of federal constitutional moment.").

Cross-petitioners do not contend that anything in 25 U.S.C. 194, or in the conduct of the lengthy proceedings below, deprived them of the opportunity to present fully any evidence to support their contention

result cannot be deemed unfair, much less an example of invidious discrimination.

Moreover, individual cross-petitioners' due process claim must be viewed in light of "the unique legal status of Indian tribes under federal law and [of] the plenary power of Congress, based on a history of treaties and the assumption of a 'guardian-ward' status, to legislate on behalf of federally recognized Indian tribes." *Morton* v. *Mancari*, 417 U.S. 535, 551-552 (1974). So viewed, Congress's judgment in adopting "legislation that singles out Indians for particular and special treatment" is to be upheld "[a]s long as the special treatment can be tied rationally to the fulfillment of Congress' unique obligation toward the Indians," *id.* at 554-555.[17]

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that the conceded former status of this area as part of the Omaha Indian Reservation had been destroyed by the movements of the Missouri River. Cf. *Vlandis* v. *Kline*, 412 U.S. 441 (1973); *U.S. Department of Agriculture* v. *Murry*, 413 U.S. 508 (1973). Because there was no such deprivation, there is no merit to the State's argument (88-1636 Pet. 14-15) that Section 194 works a taking of property without the just compensation required by the Fifth Amendment. Section 194 does not interfere with the full adjudication of ownership disputes; it merely requires the non-Indian to shoulder the burden of proving his ownership by a preponderance of the evidence. Thus, contrary to the State's submission (88-1636 Pet. 14-15), Section 194 does not "transfer property" to the United States in violation of the Takings Clause. Cf. *Block* v. *North Dakota*, 461 U.S. 273, 291 (1983) (rejecting claim that the Quiet Title Act's statute of limitations works a compensable "taking"). Unlike the time bar in *Block*, Section 194 permits, rather than prevents, judicial determinations of title based upon all probative evidence of title. To quiet title once all the evidence is considered is not, of course, to "transfer" title but to resolve the parties' ownership dispute.

[17] The Court reaffirmed this analysis in *United States* v. *Antelope*, 430 U.S. 641, 645 (1977) (footnote omitted):

> The decisions of this Court leave no doubt that federal legislation with respect to Indian tribes, although relating to Indians as such,

In order to safeguard a vital tribal resource against questionable claims, Section 194 provides that a non-Indian claimant has the burden of proof when an "Indian shall make out a presumption of title in himself from the fact of previous possession or ownership." Thus, Section 194, like the other special Indian legislation this Court has upheld, is directly related to the fulfillment of the government's special obligations to the Indians by protecting their most valuable property—their lands.[18] In an analogous context, this Court has approved a congressional reallocation of the burden of proof in a fashion designed to serve important federal policies. *Georgia* v. *United States,* 411 U.S. 526, 538 n.9 (1973) (Voting Rights Act places burden upon covered states to prove that proposed electoral changes are not discriminatory in purpose or effect); *City of Rome* v. *United States,* 446 U.S. 156, 183 n.18 (1980) (same).

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is not based upon impermissible racial classifications. Quite the contrary, classifications expressly singling out Indian tribes as subjects of legislation are expressly provided for in the Constitution and supported by the ensuing history of the Federal Government's relations with Indians.

The State cross-petitioners thus are incorrect in asserting (88-1636 Pet. 12) that because Section 194 singles out Indians for special treatment, it is "inherently suspect and subject to strict judicial scrutiny".

[18] Section 194 would therefore clearly pass muster not only under the test of *Morton* v. *Mancari, supra,* but also under the two-fold test of *Fullilove* v. *Klutznick,* 448 U.S. 448, 473 (1980), which individual cross-petitioners urge is applicable here (88-1592 Pet. 12-13). This test asks simply whether the objectives of the federal legislation are within Congress's power and whether the statute's limited use of a racial criterion is a permissible means to carry out that objective. See *City of Richmond* v. *Croson,* 109 S. Ct. 706, 717-718 (1989), discussing *Fullilove.* Here, Indians and Indian tribes are citizens for whom the United States holds lands in trust—a unique relationship—and Section 194 serves to carry out the government's trust obligations by pro-

b. The conditional cross-petition filed by the State of Iowa argues (88-1636 Pet. 9, 16) that, if the Tribe's petition is granted, this Court should also consider whether 25 U.S.C. 194 may constitutionally be applied to limit the rights of the State.

This Court has already held in this case that Section 194 does not apply with respect to the lands to which the State claims title (*Wilson* v. *Omaha Indian Tribe,* 442 U.S. at 666-668, 678); the State seeks review of the constitutionality of the application of Section 194 to its claims only in the event that a grant of the Tribe's petition puts the State at risk that the Court will "effectively overrule" *Wilson* on this point (88-1636 Pet. 9). As we have demonstrated, the Tribe's petition presents nothing to suggest that it is appropriate for this Court to reconsider *Wilson*, so there is no occasion to consider the State's objections to an application of Section 194 this Court rejected at an earlier stage of this very case.

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tecting Indian lands from the claims of non-Indians whose title cannot be established by a preponderance of the evidence. This Court's decision in *Wilson* leaves no room for doubt that Section 194 is a measure that Congress could constitutionally employ to that end, although it may be, as Justice Blackmun observed in his concurrence in *Wilson* (442 U.S. at 680-681), that Section 194 should be construed to apply in all disputes between Indians and any non-Indian—not simply any "white person"—in order to avoid creating an "irrational racial classification highly questionable under the Fifth Amendment's equal protection guarantee."

CONCLUSION

The petition for a writ of certiorari in No. 88-1426 and the conditional cross-petitions in Nos. 88-1592 and 88-1636 should be denied.

Respectfully submitted.

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